IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 61544-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JOSHUA JAMES ISLER,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: September 28, 2009
	)	

Lau, J. — Joshua Isler challenges his conviction for second degree rape of a child on grounds of ineffective assistance of counsel, prosecutorial misconduct, and cumulative error. Because Isler has failed to show that his trial counsel's representation was deficient or that he was prejudiced, we reject his ineffective assistance argument. Isler also failed to show that the prosecutor committed any misconduct, and we therefore reject that claim. And because Isler has made no showing of prejudice, the cumulative error doctrine is inapplicable. Accordingly, we affirm.

FACTS

Late on the evening of November 9, 2006, or early on November 10, Isler had sex with D.G. At the time, Isler was 17 and D.G. was 13. Up until the incident, Isler had been dating 14-year-old, S.R., who was good friends with D.G. On November 10, D.G., Isler, and other friends went to a mall in a nearby town. Unaware of this plan, D.G.'s mother was concerned when she returned home from work and was unable to locate her daughter. S.R. and her mother, J.M., helped look for D.G. While driving around to look for D.G., S.R. pointed out her boyfriend, Isler, to J.M. Concerned about their age difference, J.M. told Isler to stay away from her daughter.

Sometime after Isler had sex with D.G., he wrote a letter to S.R. S.R.'s mother testified that she found the letter under S.R.'s bed after Isler "had taken [S.R.] and run away" because she was looking for clues as to where the two might have gone. 2 Report of Proceedings (RP) (Apr.10, 2007) at 109, 166. S.R., without objection from defense counsel, read portions of this letter into the record. The excerpts included,

> "I need you to dye my hair, ASAP because my dad isn't going to do it. He thinks I did the crime so I should do the time for it. You know, that is what I F'ing hate. I wish I could just go to another state and stay there forever and never come back, you know. But I want to know, do you want to be with me forever, or no, [S. R.], . . . because I will take you if you don't F'ing tell anybody where we are, because I am not going to F'ing jail for this BS. So pretty much I want to know, are you with me or against me, baby.
>
> ". . . .
>
> ". . . . I want you to know is that, if you and I—or if you and Cory both leave with me, you better not F'ing snitch on me, because that would put me in jail for a while, you know, and then that would prove to me you don't care about me, because you snitched, you know."

2 RP (Apr. 10, 2007) at 107–08.

On December 8, 2006, Isler was charged by information with second degree

rape of a child. RCW 9A.44.076(1) defines that crime.

> A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.030 recognizes an affirmative defense that the defendant reasonably believed, based on declarations by the victim, that the victim was at least 14 or was less than 36 months younger than the defendant. RCW 9A.44.030(2), (3)(b).

The only issue at trial was whether Isler reasonably believed that D.G. was at least 14 years old or was less than 36 months younger than Isler. In closing argument and rebuttal, the prosecutor told the jury that the case was about "responsibility" and admonished the jury to hold Isler "accountable" and "responsible." 3 RP (Apr. 11, 2007) at 13, 21, 39. After a jury trial, Isler was convicted of second degree rape of a child.

ANALYSIS

Ineffective Assistance.

Isler contends that he received ineffective assistance of counsel because his trial counsel failed to object to certain testimony. The State counters that defense counsel's decision not to object was tactical and therefore not deficient and that Isler cannot show prejudice from the failure to object.

To demonstrate ineffective assistance of counsel, Isler must satisfy both prongs of a two-prong test. See State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). A reviewing court need not address both prongs if the defendant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d

56 (1986). First, Isler must establish that his counsel's representation was deficient. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To show deficient performance, he has the "heavy burden of showing that his attorneys 'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment . . . .'" State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). His attorney's conduct must have fallen below an objective standard of reasonableness considering all the circumstances. State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006). Matters that go to trial strategy or tactics do not show deficient performance; Isler bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135–36, 28 P.3d 10 (2001). Where a claim of deficiency rests on trial counsel's failure to raise an objection to admission of evidence, a defendant must show that an objection would likely have been sustained. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Second, Isler must show that his attorney's deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. Courts employ a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

Isler argues that his trial counsel should have objected on relevance grounds to S.R. reading portions of his letters into the record. Isler, however, bears the burden of

establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. Rainey, 107 Wn. App. at 135–36. Isler fails to make such a showing. Defense counsel likely made a tactical decision not to object in order to undermine the testimony of J.M. Defense counsel, through cross-examination and closing argument, cast J.M. as a biased witness in an apparent effort to question the credibility of her testimony. Defense counsel asked J.M if it was "fair to say that because of what happened, you don't think Mr. Isler is a very good person."[1] 2 RP (Apr. 10, 2007) at 168. Isler's trial counsel asked this question to paint J.M. as someone with antipathy towards Isler. In closing, defense counsel highlighted J.M.'s potential bias, stating, "It's very clear that [J.M.] did not like Josh, very clear." 3 RP (Apr. 11, 2007) at 29. S.R.'s testimony, based on the letters, that Isler had tried to run away with her would support the inference that J.M. was biased towards Isler and thus bolster defense counsel's witness strategy. Isler's trial counsel made a reasonable tactical decision not to object to S.R.'s testimony as it fed into her overall strategy of undermining J.M.'s testimony. Isler fails to show deficient representation because his trial counsel's decision not to object is attributable to trial tactics and strategy.

Isler further contends that his trial counsel should have objected, on relevance and ER 609 grounds, to J.M.'s testimony itself and failure to do so constituted ineffective assistance of counsel. Specifically, Isler asserts that his counsel was deficient in not objecting to J.M.'s testimony that she told Isler to "stay away from [her]

[1] Isler incorrectly attributes this question to the deputy prosecutor. Appellant's Br. at 8, 12.

daughter," that Isler had run away with S.R., and that J.M. had found letters to that effect under S.R.'s bed. 2 RP (Apr. 10, 2007) at 160, 165–66. All of these statements, however, could bolster defense counsel's contention that J.M. was a biased witness and therefore not credible. Indeed, defense counsel actually brought up the fact that J.M. told Isler to stay away from her daughter on cross-examination. The letters and statements about Isler running away with S.R. support defense counsel's strategy of casting J.M. as a biased witness. Isler's trial counsel's decision not to object to that testimony was therefore a matter of trial tactics and strategy and not deficient.

Even if defense counsel's representation was deficient, Isler has failed to show prejudice. Isler has the heavy burden of showing that had the testimony been excluded, the results of the trial would have been different. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). The challenged testimony, however, played such a minor role in the prosecution's case that it was unlikely to change the result of the trial. Testimony that Isler ran away with S.R. was not central to the question of whether Isler believed D.J. was at least 14. The statements at issue were isolated ones in otherwise lengthy testimony. Moreover, they were not highlighted by the prosecution in closing argument or reply. It is therefore unlikely that a jury would have convicted Isler based on these isolated statements.

It becomes still more unlikely when viewed in light of the other evidence that Isler did not believe D.J. was at least 14. Isler told detectives he "didn't know and "he didn't care" how old D.G. was. 2 RP (Apr. 10, 2007) at 201. D.G.'s mother told Isler that D.G. was thirteen and so were all of D.G.'s friends. She asked Isler "what he was

doing hanging around with a bunch of 13 year olds." 2 RP (Apr. 10, 2007) at 135. D.G. testified that Isler knew her age because "all of us always talked about our ages." 2 RP (Apr. 10, 2007) at 44. In short, there was significant evidence that Isler did not have a reasonable belief that D.G. was at least 14 and in fact knew that she was 13. In light of that evidence, statements about S.R. running away with Isler were unlikely to be so prejudicial as to change the outcome of the trial.

Prosecutorial Misconduct.

Isler next contends that the prosecutor committed misconduct in closing arguments and his rebuttal by appealing to the jury's passions and prejudices. The State counters that the challenged statements were no more than an appeal to decide the case on the evidence.

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A prosecutor has a duty to ensure a verdict is free from prejudice and based on reason, not passion. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968)). It is improper for a prosecutor to invite the jury to decide any case based on emotional appeals. In re Det. of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). A defendant establishes prejudice only if she shows a substantial likelihood that the instances of misconduct affected the jury's verdict. State

v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The defendant bears the burden of showing both prongs of prosecutorial misconduct. Hughes, 118 Wn. App. at 727.

A defendant must object contemporaneously to the prosecution's improper comments during closing argument. See State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000). Here, Isler did not object to any of the prosecutor's allegedly improper statements. Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Isler argues that the prosecutor's references to "responsibility" and exhortation to the jury to hold the defendant "accountable" and "responsible" were improper. Specifically, he asserts that the statements appealed to the jurors' passions and prejudice and invited them to convict him based on a sense of social responsibility and duty to protect the young victim.

In closing, the prosecutor stated,

> So all I ask is you ask yourselves as a group this question, is the defendant's testimony probably true and is it reasonable.
>
> I suggest to you the answer is no way.
>
> Look, the defendant didn't have anybody to hold him accountable on November 10th, nobody was going to make him be responsible, [D.G.] didn't have the skills to do that or the maturity.
>
> Today, it's up you to decide whether he's going to be held responsible. I'm asking you to do that, I'm asking you to return a verdict of guilty, because that is the responsible thing to do in this case.

3 RP (Apr. 11, 2007) at 21.

In rebuttal, the prosecutor said, "Right from the first minute I said it's

about responsibility. You know where the responsibility lies at this time. Thank you." 3 RP (Apr. 11, 2007) at 39.

These remarks were not an appeal to the jury to decide the case on an improper basis. The prosecutor's request to the jury in closing to hold Isler accountable concluded his argument that Isler had failed to carry his burden of proof for the affirmative defense. The State thus asked the jury to convict Isler based on that failure and the State's argument that it had proved its case beyond a reasonable doubt. The State asked the jury to do only what the court itself had earlier admonished them to do—decide the case based on the evidence and the law. The prosecutor's comments in rebuttal came after a discussion of the credibility of Isler's testimony and a discussion of possible reasons for conflicting testimony among the prosecution's witnesses. In this context, the prosecution's comment was no more than an admonition to find Isler guilty based on the evidence. Indeed, the prosecution began its rebuttal discussion of the evidence by saying, "Your decision has to be based on the evidence. The evidence is certain things were said." 3 RP (Apr. 11, 2007) at 38. Viewed in the context of the entire record and circumstances at trial, Isler has failed to show that the comments were improper. Hughes, 118 Wn. App. at 727 (citing Stenson, 132 Wn.2d at 718). Isler has further failed to show that the comments were so flagrant and ill intentioned that a curative instruction would not have remedied them. Russell, 125 Wn.2d at 86.

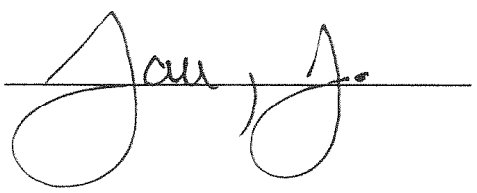
Isler next argues that his trial counsel's failure to object to the prosecutor's references to "accountability" and "responsibility" constituted ineffective assistance of

counsel. However, in order to establish deficient representation under the first prong of ineffective assistance analysis, Isler must show that an objection to the prosecutor's comments would have been sustained. In re Pers. Restraint of Davis, 152 Wn.2d 647, 748, 101 P.3d 1 (2004); State v. Johnston,143 Wn. App. 1, 19, 177 P.3d 1127 (2007). Because the prosecutor's comments were not improper, an objection by trial counsel is unlikely to have been sustained. As such, Isler cannot show deficient representation under the first prong of the ineffective assistance test. Since Isler has failed to show deficient representation, we need not address whether that representation resulted in prejudice. Fredrick, 45 Wn. App. at 923.

Cumulative Error.

Finally, Isler argues that the cumulative error doctrine justifies reversal. The cumulative error doctrine applies where "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). However, absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial. State v. Saunders, 120 Wn. App. 800, 826, 86 P.3d 232, (2004). Here, neither trial counsel's representation nor the prosecutor's statements were prejudicial. As such, the cumulative error doctrine is inapplicable and cannot supply the grounds for a new trial.

For the foregoing reasons, we affirm.



WE CONCUR:

Dwyer, A.C.J.

Schindler, C.J.